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No. 73-1781

In the

Supreme Court of the United States

OCTOBER TERM, 1974

NICKEY CHEVROLET SALES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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No.

NICKEY CHEVROLET SALES, INC.,

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 27, 1974.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit finding that the findings of its Special Master United States district court Judge Richard B. Austin (that there was no evidence that Nickey's employee Sergott was discharged in retaliation for his union activities) was clearly erroneous, is reported at 76 LRRM 2849 (1971). The opinion of the National Labor Relations Board in proceedings scheduled by it and designed as Supplemental Proceedings thereto to affix back-pay, reversing in part the recommended order of its Trial Examiner, is reported

at 195 NLRB No. 70, 79 LRRM 1460 (1972). The opinions of the Trial Examiner and the Board are printed in the Appendix hereto. The opinion of the Court of Appeals, treating the Board's application for enforcement of its back pay order as a petition for judicial determination of the amount of back pay, and adopting the Board's findings as its own, is printed in the Appendix hereto and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in the Appendix hereto, was entered on February 27, 1974. The Court of Appeals stayed its mandate for 90 days on May 2, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

THE QUESTIONS PRESENTED

1. What is the proper measure, and what are the essential elements to be considered, in initially determining whether there has been the requisite "diligent search" or "honest good faith effort" to find substantially equivalent work on the part of the discriminatorily discharged employee? Specifically, in meeting its burden of proving the lack thereof, is there any necessity that the employer show either the opportunity for, or the wilful refusal of, substantially equivalent employment? Further, is the fact that there may have been, on the part of some potential employers, bias against hiring the discriminatee by reason of his union activity, relevant to the initial consideration whether the discriminatee has made a sufficient "diligent search" or "honest, good faith effort" to find other work?

2. Where the Labor Board followed its usual procedure of a Back-Pay hearing before a Trial Examiner, and

reviewed and reversed (in large part) the Trial Examiner's Recommended Order, in a discriminatory discharge case determined *in the first instance* by the Court of Appeals on the Board's contempt petition (there being no underlying Board Order finding a discriminatory discharge and no statutory authority vesting in the Board to determine the amount of back pay, absent such underlying Board Order), and where the litigants participated therein without objection, as if the Court of Appeals had referred the matter of back pay to the Board for supplemental proceedings, with the Board in turn delegating the matter to one of its Trial Examiners as trier of fact, did not the (majority opinion of the) Court of Appeal (in addition to interposing additional and improper elements to the employer's burden of proof of lack of reasonable good faith effort by the discriminatee to obtain substantially equivalent employment), in finding the conclusions of the Trial Examiner as to the sufficiency of that discriminatee's post-April 30, 1970 efforts to be clearly erroneous, fail to give (sufficient) effect to Rule 52(a) of the Federal Rules of Civil Procedure to-wit, that part thereof providing "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"?

STATUTES AND RULES INVOLVED

The statute implementing the National Labor Relations Board and granting it power to prevent unfair labor practices and to secure Court enforcement of its orders is the National Labor Relations Act as amended; 49 Stat. (1935) as amended by Pub.L. No. 101, 80th Cong., 1st Sess.; 1947, and Pub.L. No. 257, 86th Cong., 1st Sess., 1959; 29 U.S.C. §§ 151-68, FCA 29 §§ 151-68.

Pertinent portions thereof, and Rule 52(a) of the Federal Rules of Civil Procedure, are printed in the Appendix herein.

STATEMENT

Petitioner's employee Sergott was discharged October 4, 1969. On the issue of an alleged discriminatory discharge, rather than follow through with an unfair labor practice proceeding filed under Section 10(c)of the National Labor Relations Act, General Counsel of the National Labor Relations Board elected to, and did, petition the Court of Appeals for the Seventh Circuit for a rule that Nickey show cause why it should not be held in contempt of an earlier decree of that Court, entered March 4, 1965 which ordered Nickey to cease and desist from discouraging union membership by discriminating in hiring, tenure or other conditions of employment (*NLRB* v. *Nickey Chevrolet Sales, Inc.* (unreported). Upon Nickey's filing its Answer denying the allegations of the Board's Petition, the Court of Appeals appointed United States District Court Judge Richard B. Austin as Special Master to take evidence and report his findings. The Special Master did so and duly filed his Report, finding the Board had failed to show, by clear and convincing evidence, that Respondent (Petitioner herein) was guilty of any of the nine alleged specifications in the Board's Petition. The Court of Appeals reversed, holding the findings of its Special Master clearly erroneous (*NLRB* v. *Nickey Chevrolet Sales, Inc.*, 76 LRRM 2849 (1971)). Thereupon Nickey reinstated Sergott on March 24, 1971. Upon a failure to reach agreement on the amount of back-pay, the Regional Director for Region 13 of the Labor Board, one of the parties litigant, instead of petitioning the Court of Appeals to resolve the difficulty, on his own

motion on August 11, 1971 issued a back pay specification, and scheduled a hearing September 28, 1971 before Henry L. Jalette, one of the Labor Board's own Trial Examiners, following the usual course following Court enforcement of a Board order directing payment of back-pay in general terms. Respondent (Petitioner herein) participated in the hearing. Evidence developed at the hearing established: (1) that there were approximately 500 new and used automobile dealers in the Chicago area; (2) that Sergott had his full time during the nearly 18 month interim period available to look for employment; (3) that he had an automobile available for his use during the full interim period; (4) that in the nearly 18 month interim period (October 4, 1969 to March 24, 1971) he contacted a total of 24 dealers; 20 in the first seven months (to April 30, 1970); (5) that he registered at the state unemployment agency and reported 29 times, until his benefits expired on April 30, 1970; that thereafter he did not report at all; (6) that after April 30, 1970, he did not apply to a different dealer for 6½ months, on November 18, 1970; that he contacted another different dealer January 1, 1971; another on January 8, 1971; and another on March 12, 1971; (7) that after April 30, 1970 he compounded repeat calls, in person or by telephone, to many dealers contacted before April 30, 1970, (e.g., Stamer Cadillac, 11 times; Moell Cadillac, 11 times; Gateway Chevrolet 11 times; Brigance Chevrolet, 11 times); (8) that he received no offers of employment, except two conditional on his resigning from the union; (9) that, according to Sergott, "economically things were a bit slow"; (10) that at the time of discharge he was 44 years old, with 18 years experience as a salesman for Chevrolet and Cadillac dealers; (11) that in the nearly 18 month interim period, he had absolutely no interim earnings.

The Trial Examiner concluded that after April 30, 1970, Sergott did not use reasonable efforts to find employment and recommended fixing back pay at $7,195.48. General Counsel for the Board filed exceptions thereto to the Labor Board. Respondent (Petitioner herein) filed no brief or exception to the Board. The Labor Board in due course issued its second supplemental decision and order, purporting to overrule the Trial Examiner's finding of lack of reasonable efforts to secure employment in the post-April 30, 1970 interim period, and finding Sergott entitled to $20,606.09 in back-pay. The Board petitioned the Court of Appeals for enforcement of its order, and both parties filed briefs. On oral argument the question of the proprietary of the Board's procedure was raised for the first time. At the request of the Court both the Board and Respondent (Petitioner herein) filed Supplemental Memorandums, Petitioner suggesting that the Court might consider and treat the Trial Examiner's decision like unto a Special Master's Report.

On February 27, 1974 the Court of Appeals issued its opinions, treating the Board's application for enforcement of its backpay order as a petition that the Court judicially determine the proper amount of backpay, the majority adopting the findings of the Board and holding the Trial Examiner's findings on the post-April 30, 1970 period clearly erroneous. The dissenting opinion points to both the majority opinion and the Board's as introducing an additional and improper element (possible lack of available suitable employment) to the good faith reasonable effort to find equivalent employment requirement, and finds the findings of the Trial Examiner as to the insufficiency of Sergott's post-April 30 employment search in so broad a market, clearly *not* erroneous. Both opinions are printed in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions relative to the administration of the labor law, specifically with regard to the proper measure of the employer's burden of proof of lack of due diligence on the part of the discriminatorily discharged employee, in seeking substantially equivalent employment during the interim period between date of discharge and date of reinstatement. This case raises, specifically, the question of whether it is incumbent upon the employer, in showing lack of diligence, to show: (1) that there was a job market at the time and place (within reasonable geographic distance from the employee's place of residence) for comparable employment; (2) that the discriminatee refused an offer of comparable employment during the interim period; or conversely (3) that there was an absence of discrimination against the discriminatee on the part of other potential employers in the equivalent-job-market at the time and place. Are (any of) thes · necessary to the employer's meeting his burden of proof? We submit they should not be, that there appears to be a division between the Courts of Appeal on the matter, that over the years the opinions of the Courts and of the Labor Board, have often clouded the distinction between possible means which the employer may utilize to show lack of due diligence—i.e., failure to accept an offer of substantially equivalent employment—and what showing is required, initially, of the employer to meet his burden of proof. Additionally the case raises a question of proper application of Rule 52(a) of the Federal Rules of Civil Procedure by the Court of Appeals in deciding, as it did, that the findings of the Labor Board's Trial Examiner were, as to an important aspect of the case relative to the exercise of due diligence, clearly erroneous.

I.

Not since 1941 has the Supreme Court rendered an opinion, directly touching on the employee's duty of mitigation and of making a reasonable, good faith search for work: *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177 (1941). This Court there held deductions must be made for loss of earnings wilfully incurred, rejecting the Labor Board's contention of too-burdensome administration in view of the substantial numbers of workmen involved in many cases coming before it, enunciating there both a policy of minimization of damages, and (more importantly) "the healthy policy of promoting production and employment."

In the ensuing 23 years the Nation has continued to become increasingly urbanized, and increasingly larger numbers of its work force reside in increasingly populous job-markets with perforce larger numbers of potential employers. It is submitted that, in view of that fact, and in furtherance of the Court's announced policy of promoting production and employment, and with a view to providing important guidance to the Courts of Appeal, the Labor Board, discriminatees, and employers alike, a clarification by this Court of what is required to show (lack of) due diligence in mitigation, would be most timely and helpful.

In the past 23 years a long list of cases involving the employer's meeting, or failing to meet, his burden of proof that the discriminatee did not exercise, during all or part of the interim period, what has been variously termed "due diligence" or "reasonable good faith effort" to find substantially equivalent employment, have been decided by the Labor Board and the Courts.

A number of those cases have (we submit, properly) restricted the employer's burden of proof to a *prima facie* showing of a lack of reasonable, good faith effort, considering all the circumstances, to find acceptable interim work, explicitly negating any obligation on the part of the employer to show the existence of job opportunities and that, if indeed, diligence had been exercised, diligence would have been rewarded. The Court, in *National Labor Relations Board* v. *Madison Courier, Inc.*, (..... F2d ....., 80 LRRM 3377, 3384, (CA, DC, 1972)), after quoting from *NLRB* v. *Arduini Mfg. Co.*, (394 F2d 420, 422-423, 68 LRRM 2129, CA1, 1968) to the effect that the standard is reasonable exertion(s), not the highest standard of diligence, and from *NLRB* v. *Cashman Auto Co.*, (223 F2d 832, 836, 36 LRRM 2269, CA 1, 1955) to the effect that the principal of mitigation does not require success, only honest, good faith effort, goes on to say: "On the other hand, the employer is not under the severe burden of establishing that a particular discriminatee *would have* located suitable interim employment had he only made the required effort, before the back pay liability may properly be reduced. With such diligence lacking, the circumstance of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant.' *American Bottling Co.*, 116 NLRB 1303, 1307, 38 LRRM 1465 (1956)."

On the other hand, other cases, principally the decision of the (majority of the) Court of Appeals in its opinion below, take a different view, seemingly placing on the employer (almost, if not quite) the burden of proving that due diligence would have been rewarded. The majority below says: "Respondent proved only that there are more than five hundred new and used car dealers in the

metropolitan area of Chicago. It offered no testimony as to business conditions during the period or other evidence tending to show that jobs were available for a salesman notwithstanding known union associations, or that the lack of opportunity with the dealers to whom Sergott applied was not representative . . ."

In accord with the view of the majority, the Sixth Circuit has held that in determining the reasonableness of the mitigation effort, the employee's age and labor conditions in the area are factors to be considered (*NLRB* v. *Pugh & Barr, Inc.*, 231 F2d 558 (CA4, 1956); and despite the quotation above from *American Bottling Co.*, the Board on another occasion stated: (*Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962), enforced in 354 F2d 170 (CA2, 1965), cert. denied, 384 U.S. 972):

> . . . it can be said that in broad terms a good-faith effort requires conduct consistent with inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age and his personal limitations.

Conceding there are and will be from time to time, cases arising where, in a really small labor market, once the discriminatee has exhausted all the possibilities he ought not be required to continue to go through a useless and repetitive charade, as a general principle of labor law the analysis and view of Judge Pell in the Court below, and of the Court in *Madison Courier, Inc.*, cited and quoted above, it is submitted, is much the more logical approach and should be adopted by this Court.

II.

Rule 52(a) of the Federal Rules of Civil Procedure provides: ". . .Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The Rule, by its own terms, applies "in all actions tried upon the facts without a jury or with an advisory jury." The Rule, by its terms applicable to District Courts, has been held applicable by analogy to a Court of Appeal proceeding to hold an employer in contempt for failure to comply with a decree of the Court of Appeal enforcing an order of the Labor Board, which proceeding was submitted to a special master. *NLRB* v. *Remington Rand,* 130 F2d 919, 925, 930 (CA2, 1942). By similar analogy the Rule is also applicable here, we submit.

The majority opinion in the instant case makes no direct mention of the applicability of Rule 52(a), but applies the clearly erroneous test, finding the findings of the Trial Examiner clearly erroneous in the following terms (emphasis added): "Given the effort Sergott was shown to have made, *and in the absence of proof bearing at least generally on the availability of suitable employment in the area,* we conclude the respondent did not discharge its burden of proof. Accordingly we consider the examiner's adverse finding clearly erroneous . . ." The majority gloss over a pointed comment by the examiner, saying only that " the examiner did not discredit Sergott's testimony, only noting that in his judgment, 'many of the contacts made by Sergott were window dressing.'" The examiner had the opportunity to see and judge the credibility of the witnesses (in this short hearing, Sergott was the principal witness), and we submit,

the quoted pithy comment goes directly to his credibility and to the reason for the Rule.

"A finding is clearly erroneous when although there is evidence to support it, the reviewing Court on the entire premises is left with the definite and firm conviction that a mistake has been committed." *U.S.* v. *U.S. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 LEd 746 (1948). But, *arguendo,* the majority applied (a) an improper standard of the burden on Petitioner to show lack of due diligence by Sergott; and (b) gave too cavalier treatment to that part of Rule 52(a) requiring that due regard be given to the opportunity of the trial court (here, the Trial Examiner) to judge of the credibility of the witnesses. It follows that since the premises upon which the (majority of the) Court below came to its conviction that a mistake had been committed, were faulty, that conviction itself was faulty, and should be reversed.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

NICKEY CHEVROLET SALES, INC.
and
AMERICAN FEDERATION OF PROFESSIONAL SALESMEN — Case 13—CA—6401

SECOND SUPPLEMENTAL DECISION AND ORDER

On May 4, 1965, the United States Circuit Court of Appeals for the Seventh Circuit entered its decree enforcing the National Labor Relations Board's Order[1] of March 2, 1965, in which the Board found that Respondent had discriminatorily discharged two employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended. On November 10, 1965, the court adjudged Respondent in civil contempt for refusing to reinstate the two employees. On September 23, 1966, the Board issued its Supplemental Decision and Order[2] directing Respondent to pay the two employees backpay in specified amounts. On March 11, 1971, the court again adjudged Respondent in contempt finding, *inter alia*, that Respondent violated the court decree by discharging Harold Sergott, a salesman employed by Respondent, because of his union activities. The Court ordered Respondent to offer Sergott full and bona fide reinstatement and to make him whole for all pay and benefits lost due to the discrimination against him.[3]

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[1] Unpublished.

[2] 160 NLRB 1279.

[3] *N.L.R.B.* v. *Nickey Chevrolet Sales Inc.*, ... F.2d ..... March 11, 1971).

On August 6, 1971, pursuant to the court order the Regional Director for Region 13 issued and served on the parties a backpay specification detailing the sum of money due Sergott for the period from October 5, 1969, to March 24, 1971. On September 2, 1971, Respondent filed an answer thereto. Upon appropriate notice issued by the Regional Director, a hearing was held on September 28, 1971, before Trial Examiner Henry L. Jalette.

On October 29, 1971, the Trial Examiner issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order, only to the extent consistent herewith.

1. The Trial Examiner found, and we agree, that during the backpay period Sergott would have had the use of a demonstrator automobile, and that the value of such use during the backpay period was $125 per month, or $375 per quarter.[4]

2. The Trial Examiner further found that, because of the discrimination against him, Sergott suffered a loss

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[4] In making this determination, which is concededly less than the full scheduled $200 monthly rental for an automobile, we have taken into consideration the restrictions on the use of demonstrator automobiles by salesmen at Nickey Chevrolet. The record shows that the salesman is expected to have the vehicle at the agency when he is on duty; he uses it for demonstrator purposes and makes it available to other salesmen for such purpose; it is used for lending to deserving customers; and demonstrators are subject to sale at any time.

in prizes he would have recived in sales contests sponsored by General Motors, Inc., in the total amount of $82.88. The Trial Examiner reasoned that since Sergott earned a total of $675 in prizes during the year preceding his discharge, this amount must be prorated over a period of 19 quarters because that was the representative period agreed to for determining loss of earnings other than prizes. By this method, the Trial Examiner concluded that Sergott's average quarterly prize money would have amounted to $35.52 and that amount should be added to his quarterly backpay. Thus, the Trial Examiner prorated the value of prizes received during a 4-quarter period over a 19-quarter period in estimating the value of prizes lost. We do not agree with the Trial Examiner's computation of the average quarterly prize money.

The specification alleged that Sergott should be reimbursed for the prizes he would have received, absent the discrimination against him, at the rate of $675 per year. Respondent denied this allegation, but presented no formula of its own.[5] The General Counsel selected the formula in the specification because Sergott had a record of the prizes he had received during the year before his discharge. In the absence of any evidence to the contrary, we find that the selection of this formula was reasonable. Although we do not necessarily agree with the Trial Examiner that the General Counsel could not, without justification, use a formula for prizes which was different from that used for sales commissions, we find, based on the foregoing, that there was justification in this case. Moreover, it is clear that the formula devised

[5] In view of our determination that Respondent's contentions as to this issue are without merit, we find it unnecessary to decide whether the answer was insufficient under Sec. 102.54 (b) and (c) of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, to entitle Respondent to litigate the issue as the General Counsel contends.

by the Trial Examiner was unfair to the discriminatee because it assumed he would have earned the same amount over a 19-quarter period as he in fact earned in only 1 year.

In all the circumstances, therefore, we find that the formula set forth in the specification is fair and reasonable, and that Sergott is entitled to prize money at the rate of $675 per year or $168.75 per quarter during the backpay period.[6]

3. The Trial Examiner found that there was insufficient basis to deny Sergott backpay during the period from October 5, 1969, to April 30, 1970. We agree. The Trial Examiner concluded, however, that after the expiration of his unemployment benefits on April 30, 1970, Sergott did not make reasonable efforts to find equivalent employment and therefore was not entitled to backpay for the period after April 30, 1970. We find merit in the General Counsel's exceptions to this finding.

The record shows that during the backpay period Sergott called in person on 24 different automobile dealers, and contacted them, either in person or by telephone, a total of approximately 113 times. Of these, 72 contacts were made after April 30, 1970. Respondent admittedly made an independent check to ascertain whether Sergott sought employment during the period October 5, 1969, through March 24, 1971, and learned that Sergott had visited various automobile agencies. There is no evidence that Sergott at any time during this period received or refused any job offers.[7] There also is no showing that any jobs were available at any of the automobile dealers to which Sergott applied or at any of the other Chicago automobile dealers. When the Trial Examiner asked Sergott why he did not apply to some of the other dealers, Sergott replied, "I applied to the dealers that gave me hope as [sic] getting a job there." He explained that he had worked exclusively for Chevrolet and Cadillac dealers during the 18 years he had sold automobiles. Between

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[6] *N.L.R.B.* v. *Charley Toppino and Sons, Inc.*, 358 F.2d 94 (C.A. 5).

[7] *Nickey Chevrolet Sales, Inc.*, 160 NLRB 1279, 1280.

April 30, 1970, and March 17, 1971, Sergott sought employment 11 or 12 times at Stamer Cadillac and the same number of times at Brigance Chevrolet where he had been previously employed. Thus, we find that Sergott continued to make a reasonable search for employment during the entire backpay period.

In these circumstances, we find that Respondent has failed to sustain the burden of establishing that Sergott willfully incurred a loss of interim earnings at any time during the backpay period.[8]

We shall therefore reverse the Trial Examiner's Decision insofar as it relates to his finding that Sergott is not entitled to backpay for the period from April 30, 1970, to March 24, 1971.

We conclude therefore that Respondent's obligation to make Sergott whole shall be fulfilled by payment to him of the total net backpay set forth and computed below:

	Quarterly Period					
	4—69	1—70	2—70	3—70	4—70	1—71
Gross backpay	$3,158.41	$2,065.81	$3,040.14	$3,168.51	$3,179.92	$2,730.80
Value of demontrator at $125 per month	375.00	375.00	375.00	375.00	375.00	375.00
Value of prizes	168.75	168.75	168.75	168.75	168.75	168.75
Total Quarterly Gross Backpay	$3,702.16	$2,609.56	$3,583.89	$3,712.26	$3,723.67	$3,274.55
Total Net Backpay						$20,606.09

[8] *Marlene Industries Corporation*, 183 NLRB No. 3, enfd. 440 F.2d 673, (C.A. 6); *Golay & Co., Inc.* v. *N.L.R.B.*, 447 F.2d 290, (C.A. 7).

ORDER

On the basis of the foregoing Supplemental Decision and Order and the entire record in this case, the National Labor Relations Board hereby orders that the Respondent, Nickey Chevrolet Sales, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall pay to Harold Sergott as net backpay $20,606.09, less any tax withholding required by the laws of the United States and the State of Illinois, plus interest thereon at the rate of 6 percent per annum in accordance with the formula prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Dated, Washington, D.C. Feb. 15, 1972

EDWARD B. MILLER, Chairman
JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

NICKEY CHEVROLET SALES, INC.
and
AMERICA FEDERATION OF
PROFESSIONAL SALESMEN

Case No. 13-CA-6401

Edward Maslanka, Esq., of
Chicago, Ill., for the
General Counsel.

Ray E. Poplett, Esq., of
Chicago, Ill., for
the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

HENRY L. JALETTE, Trial Examiner: On March 11, 1971, the United States Court of Appeals for the Seventh Circuit issued its opinion and order on a petition filed by the National Labor Relations Board to adjudge Respondent in civil contempt for disobeying and failing and refusing to comply with a decree of the Court entered May 4, 1965, in which the Court concluded, *inter alia*, that Harold Sergott, a salesman employed by Respondent, had been discharged because of union activities, and in which the Court ordered Respondent to purge itself of contempt by offering Sergott full and bona fide reinstatement and to make him whole for all pay and benefits lost due to the discrimination against him.[1] Pursuant to such order, the Regional Director for Region 13 issued a backpay specification on August 11, 1971, detailing the sum of money due the said Sergott. On September 28, 1971, a hearing was held in Chicago, Illinois.

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by General Counsel and the Respondent, I make the following:

Findings of Fact

I. Preliminary Statement

The specification alleges, the answer admits, and I find that the backpay period is from October 5, 1969 to March 24, 1971.

The specification alleges, the answer admits, and I find, that Sergott would have earned 89.67 percent of the average gross earnings of three representative salesmen earned in the period from January 1, 1965, through September 30, 1969, as set forth in Appendix C of the specification.

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[1] *N.L.R.B.* v. *Nickey Chevrolet Sales, Inc.*, ... F.2d ..... .

The specification also alleges that during the backpay period Sergott would have had the use of a new demonstrator automobile and that the value of the use of such a demonstrator was $202 a month or $606 per quarter. The Respondent admits that Sergott would have had the use of a demonstrator automobile during the backpay period, but it contends that the value of the use of such a demonstrator was $125 per month.

The specification alleges that during the backpay period Sergott would have received prizes from the Respondent or the Chevrolet Division of General Motors, Inc. in the value of $675 per year. Respondent denies this allegation.

The specification admits to no interim earnings for the entire backpay period and Respondent contends that Sergott did not make reasonable effort to find substantially equivalent employment and that he should therefore be awarded no backpay, or that he be denied backpay for a substantial portion of the backpay period.

II. The value of the use of a demonstrator automobile

As previously noted, it is undisputed that a salesman Sergott would have had the use of a demonstrator automobile. According to Edward J. Stephani, president of Respondent, the use of a demonstrator by a salesman is figured to be the equivalent in compensation of $125 per month. According to the specification, the value of the use of a demonstrator automobile is $202 per month. The only evidence submitted in support of the specification was the rate schedule used by Nickey Rent-A-Car, a corporation also owned by Stephani, and a $200 per month quotation given to Sergott by the former manager of the Rent-A-Car operation for the rental of a 4-door Impala for a period of 12 months.

I accept the testimony of Stephani and conclude that the value of the use of a demonstrator automobile is $125 per month. The rate schedule submitted into evidence sets forth rates for rentals for varying periods of time, not including periods longer than 1 month, and it does not take into account the use which will be made of the automobile, including such limitations as are imposed by having to use the car as a demonstrator. The $200 quotation on the back of the rate schedule was not explained by the individual who made it and is hearsay evidence. This is insufficient basis to overcome the testimony of Stephani who testified that the cost of rentals is a negotiable matter. I find, therefore, that the value of the use of a demonstrator during the backpay period was $125 per month or $375 per quarter.

III. The value of the prizes Sergott would have received

General Motors sponsors sales contests pursuant to which salesman employed by dealers such as Respondent obtain points based on sales which can be converted into merchandise prizes. Sergott testified that in the year preceding his discharge he received prizes with a total value of $675. General Counsel contends that Sergott would have earned prizes of equal value annually during the backpay period and that he is therefore entitled to an additional amount of $168.75 per quarter for the value of the prizes he was prevented from earning by reason of his discriminatory discharge.

As previously indicated insofar as gross earnings were concerned, the specification alleged that the appropriate measure of Sergott's gross backpay was 89.67 percent of the gross earnings of three representative salesmen earned in the period from January 1, 1965 through September 30, 1969. For some unexplained reason, where prizes were con-

cerned, General Counsel not only abandoned the 89.67 percent formula and the representative employees, but also he abandoned the January 1, 1965 through September 30, 1969 representative period. Respondent contends that General Counsel was not warranted in carving out the year 1969 as a period representative of the prizes Sergott would have earned annually during the backpay period, nor was he warranted in relying on Sergott's prizes rather than those of the representative employees. I agree. Having selected a representative period and representative employees for earnings other than prizes, General Counsel could not select a different period and Sergott's prizes without justifying the variance. No justification was offered. I therefore reject the backpay claim for prizes as alleged in the specification.

Despite the deficiency of the allegation, General Counsel has established that Sergott did suffer a loss in prizes by reason of the discrimination against him and Sergott is entitled to be made whole to the extent of the proof. As I view the record, for the period conceded by the specification to be an appropriate period to measure Sergott's earnings, namely January 1, 1965 to September 30, 1969, Sergott earned prizes for a total of $675.[2] Since that period consists of 19 quarters, Sergott's average quarterly prize money amounted to $35.52 and that amount shall be added to his quarterly backpay for period.

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[2] Respondent's contention that Sergott's testimony is incompetent or insufficient to establish the value of the prizes he received is without merit. It is settled law that an individual's testimony about the value of his personal property is admissible, and the only issue is the weight to be accorded the testimony. In this instance, Sergott's testimony is uncontradicted and was based on proper observations. 3 Wigmore, Evidence 716, 719 (Chadbourn Rev. 1970).

IV. Sergott's willfull loss of earnings

A. *Sergott's search for employment*

During the backpay period of October 5, 1969, to March 24, 1971, Sergott had no interim earnings. He registered with the United States Employment Service on October 10, 1969, 1 week after his discharge, and he continued to report to the claims office every week until April 30, 1970, when he had exhausted his benefits. Beginning November 13, 1969, he sought employment as a automobile salesman (the occupation in which he had been engaged for 18 years) either by personal visits to automobile dealers or by telephone calls. Between that date and March 18, 1971, Sergott sought employment in this fashion from 25 dealers and made 114 contacts.

B. *Analysis and Conclusion*

Despite the impressive evidence of attempts by Sergott to obtain interim employment, Respondent contends that on the facts of this case he did not make a diligent search for employment. Before analyzing Respondent's contentions, it should be noted that there is no dispute about the controlling legal considerations. A discriminatorily discharged employee must make reasonable efforts to find new employment which is substantially equivalent to the position from which he was discharged. *N.L.R.B.* v. *Miami-Coca Cola Bottling Co.*, 360 F. 2d 569 (C.A. 5). However, failure to make a reasonable search for interim employment in an affirmative defense to backpay liability and the burden of proof is on the employer. *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 366 F. 2d 809 (C.A. 5); *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F. 2d 447 (C.A. 8).

It is with these principles in mind, and with special emphasis on what is almost a truism, namely, that whether an employee acted reasonably or not seek-

ing employment is a question of fact,[3] that I turn to the factors enumerated by Respondent in support of its contentions. These are as follows:

(1) Sergott did not apply to any employer until November 14, 1969, 40 days after his termination.

(2) During the backpay period of nearly 18 months, Sergott contacted only 24 different automobile dealers.

(3) He did not contact his previous employer, Brigance Chevrolet, until nearly 4 months after his discharge.

(4) Sergott ignored the rest of some 500 Chicago area dealers through the entire backpay period, including a number of sizable dealers in the immediate area of his residence.

(5) As soon as his unemployment compensation benefits expired, he stopped reporting to the State Employment office.

(6) After April 30, 1970, he called on only four different dealers in a period of 11 months, and from May 1, 1970 to November 15, 1970 he applied to none.

As to item (1) I deem it insufficient to warrant a denial of backpay for the first period of Sergott's unemployment. There is no requirement that an employee wrongfully terminated must instantly seek new work, and Sergott's failure to apply to any employer until November 13, 1969, must be weighed with the evidence that he registered with the United States Employment Service within a week of his termination and was reporting to the claims office every week. Sergott may well have hoped that the agency would be able to refer him to employment and his waiting to make personal applications for

[3] *Florence Printing Company* v. *N.L.R.B.*, 376 F.2d 216 (C.A. 4).

a period of about 40 days cannot in the circumstances be deemed unreasonable.

As to item (3), Sergott's failure to contact his previous employer for a period of nearly 4 months, I see no basis to disqualify Sergott. During that 4-month period, he was reporting to the State Employment office and he had received no referrals to any employer. When he did apply to his previous employer he was unsuccessful.

Items (2), (4), (5) and (6) are complementary. In agreement with Respondent, I deem it significant that during a backpay period of nearly 18 months during which he had no interim employment, Sergott contacted only 25 out of some 500 automobile dealers in the Chicago metropolitan area. Sergott offered no explanation for his failure to apply to more than 25 dealers. Nevertheless, I do not agree with Respondent that by reason of the limited search Sergott made to find employment he is not entitled to backpay. During the period from October 10, 1969 to April 30, 1970, Sergott was registered with and reporting to the State Employment office. While there is no evidence that he received a single referral during the entire period he was registered, it was not unreasonable for him to place some reliance on that office to refer him to employment, particularly when he was contemporaneously seeking employment through his own efforts from at least some of the Chicago area's automobile dealers. Under these circumstances, and because I do not believe that a discharged employee must exhaust all possibilities in seeking interim employment, I conclude that Sergott's failure to broaden his search for employment between the date of his discharge and April 30, 1971, is insufficient basis to deny him backpay for that period.

A different conclusion is warranted, however, with regard to Sergott's efforts to find employment after

the expiration of his employment benefits on April 30, 1970. Those efforts cannot be deemed reasonable on the facts presented herein. After April 30, 1970, he kept applying to the same employers repeatedly although there is no indication he was receiving any encouragement. For example, between April 30, 1970, and March 17, 1971, he applied at (or telephoned) Stamer Cadillac, 11 times; Moell Cadillac, 11 times; Gateway Chevrolet, 11 times; Brigance Chevrolet, 11 times. These were all dealers to whom he had applied before April 30. Not until November 18, after a period of 6½ months, did he apply to a new dealer. Thereafter, he contacted another new dealer on January 4, 1971; another one on January 8, 1971; and yet another one March 12, 1971. There is no explanation why, having limited his search to 21 dealers over a period of 13 months, Sergott decided to expand his search, and yet to do so in such a limited fashion. In my judgment, many of the contacts made by Sergott were window dressing. An undetermined number were merely telephone calls, and as previously noted they were repeated calls. Given the size of the employment market and the fact that he was no longer registered with the State Employment office, it cannot be said that such efforts to find equivalent employment were reasonable. Sergott is 44 years old with 18 years of experience. It is inconceivable to me that he would have been unemployed for 18 months had he made reasonable efforts to find equivalent employment. On the facts of this case, I conclude that Sergott is not entitled to backpay for the period after April 30, 1970.

V. Summary

Summarizing the foregoing, I conclude that Respondent's obligation to make Sergott whole shall be fulfilled by payment to him of the total net backpay set forth and computed below:

	Quarterly Period		
	4-69	1-70	2-70[4]
Gross Backpay	$3,158.41	$2,065.81	$1,013.38[5]
Value of Demonstrator at $125 a month	375.00	375.00	125.00
Value of Prizes	35.52	35.52	11.84
Total Quarterly	$3,568.93	$2,476.33	$1,150.22
Total Net Backpay			$7,195.48

[4] To April 30, 1970.

[5] One-third of the Gross Backpay set forth in Appendix C to the Backpay Specification.

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, I recommend that the Board issue the following:

Supplemental Order

Respondent, Nickey Chevrolet Sales, Inc., its officers, agents, successors, and assigns, shall pay to Harold Sergott as net backpay $7,195.48, less any tax withholding required by the laws of the United States and the State of Illinois, plus interest thereon at the rate of 6 percent per annum in accordance with the formula prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Dated at Washington, D.C.

/s/ HENRY L. JALETTE
HENRY L. JALETTE
Trial Examiner

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

March 11, 1971

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

No. 15122 *vs.*

NICKEY CHEVROLET SALES, INC.,
Respondent.

Proceeding for Civil Contempt.

ORDER

The National Labor Relations Board has petitioned this court to adjudge the respondent Nickey Chevrolet Sales, Inc. in civil contempt for disobeying and failing and refusing to comply with a decree of this court entered May 4, 1965. Our decree ordered respondent to cease and desist from discouraging union membership by discriminating in hiring, tenure or other conditions of employment or interfering with its employees in the exercise of their right to self-organization.

An answer was filed, raising issues of fact, and the matter was referred to the Honorable Richard B. Austin, United States District Judge for the Northern District of Illinois, as Special Master, for hearing and report. The report contained findings adverse to the Board and recommended dismissal of the petition; the Board filed exceptions; briefs have been submitted and the entire matter considered by this court.

All specifications in the petition involved respondent's conduct toward its salesman employee Harold Sergott.

Sergott had been active in organizing the sales employees and in picketing during a strike, was president of the union, and met with management in bargaining sessions. President Stephani and General Manager Dimitroff were opposed to a salesmen's union. The conduct complained of was largely that of Mr. Dimitroff.

Specification 1 concerned the recall of Sergott's demonstrator before his leaving for a vacation in Europe in April, 1969. Specification 2 concerned a splitting of commission between Sergott and another salesman on a car sold by Sergott, but delivered by the other during Sergott's vacation. Specification 3 concerned Dimitroff's disapproval of a sale negotiated by Sergott, on the ground the profit to respondent would be too low. Specification 5 concerned an appraisal (August 3, 1969) of a customer's car, offered in trade, at a very low figure, causing the loss of a sale Sergott could have negotiated. Specification 7 concerned a sale to a Mr. Wallace October 1, 1969; Dimitroff approved the sale, as found by the court, in reliance upon a misrepresentation by Sergott, and refused to fulfill it when he discovered the misrepresentation. Specification 9 concerned splitting of commissions in November and December, 1969, on cars sold by Sergott, but delivered after his discharge. With respect to each of these, the Special Master found there was not clear and convincing evidence that the conduct complained of was done for the purpose of harassing and discriminating against Sergott.

The Special Master had in mind the correct rule as to the required quality of evidence. "Before the master, the Board was required to establish civil contempt by clear and convincing evidence." *NLRB* v. *Alamo Express, Inc.* (5th Cir., 1968), 395 F.2d 481, 482. Furthermore, "A Special Master's finding of facts are not to be set aside unless clearly erroneous." *Olson Rug Company* v. *NLRB* (7th Cir., 1962), 304 F2d 710, 712. If the specifications just enumerated, and the findings thereon stood alone, we would conclude they were not clearly erroneous. Fact

finding as to each of the foregoing specifications involved evaluation of credibility of witnesses who gave conflicting testimony, and it would be difficult to say that the findings of the Special Master, who saw and heard the witnesses, were clearly erroneous. Although there are, as conceded by respondent, some erroneous recitations in the Special Master's description of the transactions in Specifications 3 and 7, these are details which do not go to the ultimate issue of discriminatory motivation.

Specification 4 was withdrawn.

The findings on Specifications 6 and 8, however, are clearly erroneous and we reject that portion of the report.

Specification 6 reads as follows: "On or about September 27, 1969, the Company denied Sergott part of a commission due him on the sale of a 1969 Corvette automobile."

This specification related to an incident where a prospect named Semerling came in looking for a car, made a deal, deposited $10, and later backed out.

It is undisputed that Semerling intended to talk with Sergott, whom he new, first met salesman Aberle, but later saw Sergott and came over to him. Sergott suggested the two salesmen split the commission, but Dimitroff accused him of stealing the deal from Aberle and said Sergott could not have any of the commission.

The Special Master's findings were clearly erroneous in that he found that Sergott "took the customer away from" Aberle and that Dimitroff decided the commission should be split. Since not one ultimately got the commission, the incident has little practical significance. It occurred, however, only a week before the discharge. Allen Davidson, who had been truck manager during 1969, testified that he heard some of the conversation between Dimitroff and Sergott and Dimitroff then told Davidson that Dimitroff "was trying to get Mr. Sergott angry enough to swing at him so that he would have an excuse to clobber him and finally get rid of him."

Specification 8 reads as follows: "On October 4, 1969, the Company discharged Sergott in retaliation for his union activities." Dimitroff discharged Sergott on that date, telling him that it was for "loud talking and low production."

With respect to this specification, the Special Master found only "that there is no evidence that Sergott was discharged in retaliation for his Union activities." The finding is clearly erroneous.

Peter Sabatino, who had been assistant new car manager in 1969, testified that Dimitroff had had Sabatino find out about Sergott's position with the union; Dimitroff said several times he would like to get rid of Sergott because he was a trouble maker. Sabatino asked Dimitroff why he kept Sergott on if he belonged to the union. Dimitroff replied that was the way President Stephani wanted it; that "Mr. Stephani likes to play games with him". Sabatino volunteered to, and did, suggest to Sergott that he quit instead of being fired. Sabatino heard Dimitroff tell Stephani's assistant in August that Dimitroff wanted to get rid of Sergott and that the company's lawyer was coming over to look over some of the things against him. Davidson testified that Dimitroff told him Sergott was stirring up the men with his union activities and he had to get rid of him.

Dimitroff testified he did not recall the statement to Sabatino and Davidson.

Dimitroff and Stephani both testified but neither testified concerning the decision to discharge Sergott. It seems incredible, under the circumstances, that they did not discuss it before hand.

The causes Dimitroff stated to Sergott were loud talking and low production. The charge of loud talking evidently relates to an incident the previous day when Presidnt Stephani reprimanded Sergott for speaking too loudly in the sales room. Sergott apologized, and Stephani said that was the end of the incident as far as he was concerned. Hs intimated that Dimitroff must have learned of it through third parties.

As to the low production, there was evidence of the total number of cars sold by Sergott, including only 3½ in September, larger numbers in earlier months. Sabatino testified Sergott was capable of more sales, but thought that he lost sales because of harassment by management. There are several reasons for concluding that the grounds stated to Sergott were not the real motivation, but were excuses used to cover the anti-union motivation: (1) The loud talking incident was admittedly insignificant: (2) There is no evidence that Sergott was given any warning about the low sales performance; Stephani apparently considered him a good salesman and had been willing to make him sales manager at about the time of the union election; (3) the evidence already referred to was unimpeached and indicated an intention to discharge because of union activity and a search for other grounds which would conceal the anti-union motivation. Although the Special Master found as to Specification 7 that a day or so before the discharge Sergott had misrepresented the terms of a deal to Dimitroff in order to obtain approval, and although there is some evidence to support (as well as some to negate) such finding, it seems strange that if it really happened that incident would not have been used as a cause of discharge. No explanation was offered.

A majority of this division of the court deems the evidence clear and convincing that respondent was guilty of wilfull violation of this court's decree, and guilty of contempt, as hereinafter found.

The court finds:

(1) That respondent desired to get Sergott out of its establishment in order to terminate his activity among and in behalf of its employees in support of the union which represented the employees.

(2) That respondent sought for a device or excuse for discharging Sergott.

(3) That on October 4, 1969, respondent discharged Sergott with the statement that the discharge was for

loud talking and low production, but that such discharge was principally motivated by respondent's desire to terminate his union activity among its employees.

(4) That by such discharge respondent wilfully violated the decree of this court dated May 4, 1965; discouraged membership in a labor organization by discriminating in regard to tenure on account of union activity; interfered with its employees in the exercise of their right to organize, to form a labor organization, and to bargain collectively; and become guilty of contempt of this court and its decree.

And

It is accordingly Ordered, Adjudged, and Decreed

(1) That respondnt is found in contempt of this court and its decree, and that if it defaults in purging itself of such contempt in the manner and within the time hereinafter specified, respondent will be fined $1,000 for each day it fails so to purge itself, and this court reserves jurisdiction to issue an attachment against Edward Stephani or any other officer or agent of respondent responsible for its said default and commit them for imprisonment so long as it fails so to purge itself.

(2) That respondent shall purge itself of said contempt by:

(a) Fully complying with and obeying the Board's order as enforced by the Court, by ceasing and desisting from threatening, coercing or interfering with employees in their exercise of rights guaranteed by Section 7 of the National Labor Relations Act, and by ceasing to discourage membership in any labor organization by discrimination in regard to hire, tenure or other conditions of employment.

(b) Offering Harold Sergott full and bona fide reinstatement to his former or substantially equivalent position, without prejudice to his seniority

and other rights and privileges, and making him whole for all pay and benefits lost due to the discrimination against him, together with 6% interest thereon, and preserving and making available to the Board all records and books necessary to analyze the amount of backpay due, and to determine whether Sergott has been properly reinstated.

(c) Mailing to each of its employees, a notice to be furnished by the Board's Regional Office, and signed by an official of the respondent, stating that the respondent had been adjudged in civil contempt of this Court for disobeying its order, that it will carry out the purgation ordered by the Court and that it will not henceforth interfere with, restrain or coerce its employees in the exercise of their protected rights or discourage membership in any labor organization by discrimination in regard to hire, tenure or other conditions of employment; and further posting copies of such notices, together with the contempt adjudication, in conspicuous places where notices to employees customarily are posted, for a period of sixty consecutive days, and maintaining such, in clearly legible condition, throughout such posting periods and assuring that they are not altered, defaced, or covered by any other material.

(d) Instructing its supervisors to comply with the provisions of the Court's order prohibiting interference with, restraint and coercion in regard to employees' statutory rights and prohibiting the discouraging of membership in any labor organization by discrimination in hire, tenure or other conditions of employment; and taking reasonable steps to assure compliance with the Court's order.

(e) Filing a sworn statement with the Clerk of this Court and a copy thereof with the Director

of the Thirteenth Region of the Board, within ten (10) days after the entry of this adjudication in contempt, showing what steps have been taken by the respondent to comply with the Court's directions.

(f) Paying to the Board fees and all costs and expenditures, including counsel fees, incurred by the Board in the investigation, preparation, presentation, and final disposition of this proceeding.

National Labor Relations Act as amended. Portions of Section 10 thereof:

"Prevention Of Unfair Labor Practices

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . .

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. . . .

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of

fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. . . .

"(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . ."

Federal Rule of Civil Procedure 52(a) provides in part:

"Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

May 2, 1974

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. NICKEY CHEVROLET SALES, INC., *Respondent.*	Application for Entry of Summary Judgment for Enforcement of an Order of the National Labor Relations Board.
No. 1314	

ORDER

This matter comes before the court on the motion of respondent Nickey for stay of our judgment entered February 27, 1974 pending a petition for certiorari, and the Board's response.

It appears that respondent has deposited the sum of $28,000 cash with Chicago Title Insurance Company as a trust fund pursuant to "Trust Agreement with Deposit of Security to Protect Against Exceptions to Title," dated November 16, 1973, and has given a written direction, dated December 3, 1973, to the Company to pay to Harold Sergott the amount finally found due Sergott, upon exhaustion of the possibility of review by the Supreme Court, by certiorari, of our judgment. The Board is satisfied with said security, provided our stay order includes certain provisions.

Upon consideration,

IT IS ORDERED,

That Chicago Title Insurance Company shall hold the $28,000 fund (which may be deposited in an interest bearing bank account) until the expiration of the period within which respondent Nickey is allowed to file a petition to the Supreme Court for certiorari, and, if such petition be filed, until the petition is finally disposed of, and that the petitioner Board's right to that fund, as defined in the documents attached to respondent Nickey's motion shall not be in any way impaired, and

That our judgment entered February 27, 1974 be stayed until the expiration of ninety days from the date of said judgment and, if a petition for certiorari be filed by respondent until the petition be finally disposed of.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1972 — JANUARY SESSION, 1973

No. 72-1314

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NICKEY CHEVROLET SALES, INC.,
Respondent.

ARGUED FEBRUARY 13, 1973 — DECIDED FEBRUARY 27, 1974

Before FAIRCHILD and PELL, *Circuit Judges*, and CAMPBELL, *Senior District Judge*.*

FAIRCHILD, *Circuit Judge*. The present proceeding arises out of a judgment of this court, entered March 11, 1971, finding respondent Nickey in civil contempt for disobeying a decree of this court entered May 4, 1965. Our 1965 decree enforced an N.L.R.B. order, and ordered respondent to cease and desist from discouraging union membership by discriminating in hiring, tenure or other conditions of employment or interfering with its employees in the exercise of their right to self-organization.

Our 1971 judgment, entered after a proceeding initiated before us by the Board, found that respondent, by dis-

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

charging its employee Sergott on October 4, 1969, wilfully violated the 1965 decree and became guilty of contempt of this court and its decree. We provided, among other things, that respondent shall purge itself of said contempt by reinstating Sergott "and making him whole for all pay and benefits lost due to the discrimination against him, together with 6% interest thereon. . . ." The discharge of Sergott was never the subject of an unfair labor practice proceeding before the Board.

Respondent reinstated Sergott March 24, 1971. Whether respondent then offered or tendered any amount of back pay is not clear, but in any event agreement on the amount necessary to comply with our 1971 judgment was not reached. The Board might then have asked this court to find that respondent had not purged itself so as to escape the penalties we prescribed in the event of respondent's default. Resolution of the dispute over the amount to be paid would then, either upon petition by the Board, or by respondent, perhaps accompanied by a tender, have been a function of this court, doubtless performed through a special master appointed by us.

The Board, however (and apparently at all times with the acquiescence of respondent), proceeeded to make an administrative determination of the amount of back pay required. The regional director issued a back pay specification, respondent answered, a hearing was held before a trial examiner, General Counsel filed exceptions, the Board reversed the examiner in part, and issued an order, 195 NLRB No. 76, requiring respondent to pay Sergott $20,606.09, less tax withholding, and plus interest. The Board seeks enforcement of this order by a further decree of this court.

The procedural problem is that the foundation for a determination of the amount of back pay in Sergott's case is not a Board remedial order in a statutory unfair labor practice proceeding requiring respondent to reinstate Sergott and pay him back pay, but is an order of this court requiring respondent to do so in order to remedy an event which was never the subject of an unfair labor practice proceeding before the Board. As will be seen, we think there was no statutory authority for the back pay order entered by the Board, nor for the Board's peti-

tion to this court for enforcement of that order, and that any legal stature which the Board's back pay order has must be predicated upon the 1971 decree of this court, together with respondent's acquiescence in, and failure to object up to the time of oral argument before this court to the form of procedure followed.

After oral argument, the parties supplied supplemental memoranda. The Board argues that our 1971 judgment "tracks closely the language of a typical Board order of reinstatement and back pay, and appears to contemplate, if necessary, the usual back pay proceedings before the Board." In other words, it appears to be the Board's position that the similarity of the function of determining the amount of back pay in this case to the function regularly performed by the Board in other instances is to be given controlling significance.

It is true that the Board's authorization under 29 U.S.C. §160(c) to "take affirmative action including reinstatement of employees with or without back pay" has been construed to include the conduct of proceedings to determine the amount of back pay following court enforcement of a Board order directing payment of back pay in general terms. See *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 29, 97 L.Ed. 23, 30 (1952); *National Labor Relations Board* v. *Bird Mach. Co.*, 174 F.2d 404, 405 (1st Cir., 1949); *Wallace Corporation* v. *National Labor Relations Board*, 159 F.2d 952, 954 (4th Cir., 1947); *National Labor Rel. Board* v. *New York Merchandise Co.*, 134 F.2d 949 (2d Cir., 1943).

It is the ordinary practice of the Board not to consider the amount of back pay until its general remedial order has been enforced by the court on its merits, in order to avoid unnecessary efforts if enforcement be denied. See *N.L.R.B.* v. *Deena Artware*, 361 U.S. 398, 411, 4 L.Ed.2d 400, 409-10 (separate opinion) (1960); *Nathanson, supra; New York Merchandise Co., supra.* The Board has promulgated rules establishing the procedures for back pay proceedings subsequent to court enforcement of its orders. 29 C.F.R. §101.

Courts have approved this procedure on the theory that the order of the Board requiring reinstatement and back

pay clearly contemplates further administrative determination on its part; that the initial order is analgous to an interlocutory judgment fixing liability but not determining damages; and that the enforcement decree is analogous to an affirmance of such interlocutory judgment on appeal. After enforcement, the prior administrative proceedings resume and the exact amount of back pay due is determined.[1] If the supplemental Board order embodying this specific amount of back pay comes before the court again either for enforcement under §10(e) or for review under §10(f), an even more restricted judicial inquiry may be in order than is called for by the "substantial evidence test." In reviewing the Board's choice of a formula for computing back pay the Supreme Court has stated that the Board's order "'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" [citations omitted] *National L.R.B.* v. *Seven-up Bottling Co.*, 344 U.S. 344, 346-47, 97 L.Ed. 377, 381-82 (1953).

The procedural stance of the instant case is quite different. Here, the Board did not commence another unfair labor practice predicated upon the discharge of Sergott, but chose, instead, to seek a judicial determination of the unlawfulness of his discharge in a contempt action.[2] In such an original proceeding before the court of appeals or its master, the Board must prove, much like a prosecutor in a criminal action, except by clear and convincing evidence, that the respondent has failed to comply with the decree of the court. See, e.g., *N.L.R.B.* v. *Laney & Duke Storage Warehouse Co.*, 424 F.2d 109, 112 (5th Cir., 1970); *Alamo Express, Inc., supra.* In contrast, at an enforcement proceeding the Board defends its order as supported by the record made before the Board.

[1] Clearly it would be inappropriate for the court to usurp the Board's function at this stage by either hearing evidence or appointing a master to determine the specific amount of back pay due. See *New York Merchandise Co., supra.*

[2] The Board has the responsibility of obtaining compliance with court decrees and may, when necessary, petition the court to hold a respondent in contempt. See, *e.g.*, *NLRB* v. *Alamo Express, Inc.*, 395 F.2d 481 (5th Cir., 1968); *Olson Rug Company* v. *N.L.R.B.*, 304 F.2d 710 (7th Cir., 1962); 29 C.F.R. §101.15, 29 U.S.C.A., p. 275. The purpose of providing an "immediately available" court decree via section 10(e) is to serve as a basis for contempt proceedings in the event of a subsequent renewal of the unfair labor practice. See *National Labor Rel. Bd.* v. *Mexia Textile Mills*, 339 U.S. 563, 569, 94 L.Ed 1067, 1073 (1950).

The Board relies on the procedure followed by this court in *N.L.R.B.* v. *My Store, Inc.*, 468 F.2d 1146 (7th Cir., 1972), *cert. denied* 410 U.S. 910. There this court gave effect to the Board's back pay determination as an appropriate administrative proceeding within the Board's province. The Board had ordered reinstatement and back pay to a class of employees in an unfair labor practice proceeding; this court enforced; later this court found the employer in contempt for failure to make proper offers of reinstatement; after reinstatement, the court found the purgative terms of the contempt order had been satisfied, and remanded to the Board to determine back pay. Although the sequence of the proceedings is indeed similar to that in the instant case, we think there is a significant difference. In *My Store,* the back pay determination, although following a contempt adjudication, was a continuation of the original unfair labor practice proceeding, and a filling out of the Board's original remedial order.

Respondent's obligation to pay back pay to Sergott arose solely from the order of this court, and not from an order of the Board. If the Board, after an appropriate unfair labor practice proceeding, had ordered respondent to pay back pay to Sergott, the Board would, as held in the decisions above cited, have had authority to determine the amount in a further proceeding. Absent such underlying Board order, we think there was no authority for the Board's determination of the amount of back pay. The determination would be a nullity, and, unhappily, a waste of effort unless respondent's acquiescence makes possible a degree of salvage.

If the Board had been proceeding within its authority, the test on judicial review would be whether its findings were "supported by substantial evidence on the record considered as a whole." 29 U.S.C. §160(e). Under the present circumstances, that test does not apply, because the statute did not confer the authority to make the determination, nor do we think that respondent's acquiescence could do so.

Respondent does, however, suggest in argument that the Board's determination could be treated as that of a special master and adopted by this court except where clearly erroneous.

It is, of course, improbable that we would have appointed the Board, or one of its examiners, our special master, in view of the Board's status as a litigant, albeit one not seeking the vindication of a private interest. The Board relies on the part of our contempt order requiring the "preserving [by respondent] and making available to the Board all records and books necessary to analyze the amount of backpay due, and to determine whether Sergott has been properly reinstated." This language required disclosure of information to the Board, but could hardly imply an appointment of the Board as special master.

Nevertheless, in accord with the interest of judicial and administrative economy, we shall proceed, at least in approximation, to follow respondent's suggestion, and resolve the matter upon the record made, according no greater weight either to the decision of the examiner or of the Board than that to which findings of a special master would be entitled.

Sergott was discharged October 4, 1969 and reinstated March 24, 1971. The Board proposed a formula for determining his cash earnings during the interim: a percentage of the actual earnings during the interim of three other salesmen. The percentage was derived from a comparison over a previous 4¾ year period. There is no issue with respect to this formula. There is no evidence that he received other earnings during the interim. The examiner concluded, and the Board agreed, that Sergott's efforts to find other employment were reasonable from October 5, 1969 to April 30, 1970, while registered with and reporting to the state employment office. Respondent takes no issue with the decisions concerning this period.

The examiner concluded that Sergott's efforts after April 30, when he was no longer reporting to the employment office, could not be deemed reasonable. The Board reversed this part of the examiner's decision, on the basis that respondent had failed to sustain its burden of establishing that Sergott wilfully incurred a loss of earnings.

The failure of a discriminatorily discharged employee to make a reasonable search for interim employment sub-

stantially equivalent to his prior position constitutes an affirmative defense to back pay liability; the burden of proof is on the employer. *N.L.R.B.* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir., 1972); *N.L.R.B.* v. *Reynolds*, 399 F.2d 668, 669 (6th Cir., 1968); *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575 (5th Cir., 1966); *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir., 1963).

The fact which the employer must prove has been described by the Supreme Court as "losses which [the employee] willfully incurred" and "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp.* v. *National Labor Rel. Bd.*, 313 U.S. 177, 198, 200 (1941). Additional specifications have been widely accepted by the Board and Courts of Appeals: "fails diligently to search for alternative work", *N.L.R.B.* v. *Master Plastics Corp.*, 354 F.2d 170, 174, n. 3 (2d Cir., 1965), *cert. denied* 384 U.S. 972; "Failure . . . to make a reasonable search for interim work", *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575 (5th Cir., 1966); and failure to make an "honest good faith effort", *N.L.R.B.* v. *Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir.,1955), followed in *Golay & Co.* v. *N.L.R.B.*, 447 F.2d 290 (7th Cir., 1971).

The facts appearing in the record are as follows: At the time of discharge, Sergott was 44 years old and had been employed as a salesman by Chevrolet and Cadillac dealers for 18 years. Sergott registered with the state employment agency and reported 29 times up to April 30, 1970. Apparently these did not produce referrals. During the same period he called on 20 car dealers and made some 20 follow up telephone calls. After April 30 and before reinstatement, he made new contacts with four dealers and his total contacts with these dealers and some of those contacted earlier were 72, including a number of phone calls. Sergott testified he directed his later efforts toward those who initially encouraged him. He received no offers except from two dealers who conditioned further consderation on his resignation from the union.

The examiner did not discredit Sergott's testimony, only noting that in his judgment, "many of the contacts made by Sergott were window dressing."

Respondent proved only that there are more than five hundred new and used car dealers in the metropolitan area of Chicago. It offered no testimony as to business conditions during the period or other evidence tending to show that jobs were available for a salesman notwithstanding known union associations, or that the lack of opportunity with the dealers to whom Sergott applied was not representative. Sergott testified that "economically things were a bit slow at this time."

We think that the examiner, in ultimate effect, imposed on Sergott the burden of proving that his efforts were reasonable. Given the efforts Sergott was shown to have made, and in the absence of proof bearing at least generally on the availability of suitable employment in the area, we conclude the respondent did not discharge its burden of proof. Accordingly, we consider the examiner's adverse finding clearly erroneous, and find that Sergott's efforts were reasonable.

A second element of back pay was the value of the use of a demonstrator which would have been available to Sergott if employed by respondent. The examiner fixed a value per month, and the only challenge by resondent is that the Board has extended the figure over the whole interim.

A third element of back pay was the value of prizes in various sales contests sponsored by General Motors in which Sergott would have participated if employed.

Sergott testified without dispute that in the year preceding his discharge he received prizes worth $675. If that period were deemed representative of the interim, an allowance of $168.75 for each quarter would be appropriate. This was the figure used by the Board.

The examiner noted that when the General Counsel worked out a formula for cash earnings he had considered that a period of 4¾ years, or 19 quarters, should be used for comparison of Sergott and the other salesmen. The examiner felt that a justification must be shown for selecting a different period as representative of prizes received. Since there was no evidence of the prizes received in any but the last year, the examiner pro rated the $675 over the 19 quarters, allowing $35.52 per quarter to compensate for loss of prizes.

Respondent offered no testimony to show that the one year period was not reasonably representative. Under these circumstances we consider the examiner's finding clearly erroneous and adopt the finding of the Board.

For reasons already indicated, we treat the Board's application for enforcement of its back pay order as a petition that we judicially determine the amount of back pay which respondent must pay Sergott in order to purge itself of contempt under our 1971 judgment. We adopt the findings of the Board as our own, consistently with the foregoing opinion.

Accordingly,

IT IS ORDERED and ADJUDGED by the Court that within 20 days from the date this order is filed and entered, respondent shall pay to Harold Sergott, as the amount required under paragraph 2(b) of our judgment of March 11, 1971, $20,606.09, less any tax withholding required by the laws of the United States and the State of Illinois, plus interest thereon at the rate of 6 per cent per annum in accordance with the formula prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716, and

IT IS FURTHER ORDERED and ADJUDGED that in default of payment by such time, respondent shall be subject to the fine, and its officers and agents shall be subject to attachment, as provided in paragraph (1) of said judgment.

PELL, *Circuit Judge*, dissenting.

In my opinion, with regard to Sergott's back pay entitlement for the period subsequent to April 30, 1970, the trial examiner in a well reasoned and eminently fair opinion reached the only correct result. I therefore respectfully dissent.

Nickey Chevrolet is not a newcomer to the halls of this court. The present disposition marks the second time that a panel of this court had found clearly erroneous findings of fact made by a front line trier of fact following an evidentiary hearing. On the first occasion, the master, a United States district court judge, to whom this court referred the case found that there was no evidence that

Sergott was discharged in retaliation for his union activities. The finding was held to be clearly erroneous. *NLRB* v. *Nickey Chevrolet Sales, Inc.*, No. 15,122, 76 LRRM 2849 (1971).

The panel found Nickey Chevrolet in contempt and, *inter alia*, ordered that Sergott be offered full reinstatement (which was subsequently done) and that he be made whole for all pay and benefits lost due to the discrimination against him. 76 LRRM at 2852.

The case is now back with us again in the anomalous procedural posture which Judge Fairchild has carefully and, in my opinion, correctly analyzed. Again, however, this court has disagreed with the trier of fact, who had the opportunity to hear and evaluate witnesses, to the extent of holding his findings on the post-April 1970 period to be clearly erroneous.

I think it well at this point to look at the pertinent portion of the trial examiner's opinion:

> "A different conclusion is warranted, however, with regard to Sergott's efforts to find employment after the expiration of his employment benefits on April 30, 1970. Those efforts cannot be deemed reasonable on the facts presented herein. After April 30, 1970, he kept applying to the same employers repeatedly although there is no indication he was receiving any encouragement. For example, between April 30, 1970, and March 17, 1971, he applied at (or telephoned) Stamer Cadillac, 11 times; Moell Cadillac, 11 times; Gateway Chevrolet, 11 times; Brigance Chevrolet, 11 times. These were all dealers to whom he had applied before April 30. Not until November 18, after a period of 6½ months, did he apply to a new dealer. Thereafter, he contacted another new dealer on January 4, 1971; another one on January 8, 1971; and yet another on March 12, 1971. There is no explanation why, having limited his search to 21 dealers over a period of 13 months, Sergott decided to expand his search, and yet to do so in such a limited fashion. In my judgment, many of the contacts made by Sergott were window dressing. An undetermined number were merely telephone calls, and as previously noted they were repeat calls. Given the size of the

employment market and the fact that he was no longer registered with the State Employment office, it cannot be said that such efforts to find equivalent employment were reasonable. Sergott is 44 years old with 18 years of experience. It is inconceivable to me that he would have been unemployed for 18 months had he made reasonable efforts to find equivalent employment. On the facts of this case, I conclude that Sergott is not entitled to backpay for the period after April 30, 1970."

Elsewhere in the decision it is pointed out that other than with regard to the dealers mentioned in the foregoing quoted portion, twenty-four in all, Sergott ignored the rest of some 500 Chicago area dealers through the entire back pay period, including a number of sizable dealers in the immediate area of his residence, that he discontinued reporting to the State Employment office as soon as his unemployment compensation benefits stopped, and that he did not contact a previous employer, Brigance Chevrolet, until nearly four months after his discharge.

Some of these additional matters just mentioned were, of course, not directly germane to the period subsequent to April 30, 1970. They are worthy of mention, however, in two respects. First, as I have mentioned, it appears to me that the trial examiner was eminently fair. Thus, he did not disqualify Sergott for an initial period even though Sergott waited four months to get in touch with Brigance. He was afforded similar favorable treatment notwithstanding that he did not apply to any employer until forty days after his termination. Second, it appears to me that the general attitude of Sergott reflected during the initial period serves as a background for evaluation of his efforts during the period here in question.

The standards for determining whether there is back pay entitlement are correctly outlined in the majority opinion. These synthesize into a requirement that the employee make an honest, good faith and reasonable effort to find other work. Despite what appears to me to be a complete lack of meeting these standards on the part of Sergott, the majority opinion overturns the finding of the trial examiner on the basis that the burden of proof on the company was not met.

Because of the rather unusual procedural aspect of the present case, arising as it does not from an unfair labor practice, a question might potentially exist as to who did have the burden of proof. However, noting statements such as "[t]he cases are unanimous that the defense of wilful loss of earnings is an affirmative defense, and that the burden is on the employer to prove the defense," *NLRB* v. *Reynolds*, 399 F.2d 668, 669 (6th Cir. 1968), I will assume that once the General Counsel had established the gross amount of back pay the burden was on Nickey. *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972). However, I do not conceive that this burden is to prove the lack of reasonable effort beyond a reasonable doubt but only by the greater weight of all of the credible evidence, considering the record as a whole. *NLRB* v. *Madison Courier, Inc., supra* at 1318. The burden, in any event is only to show the lack of reasonable effort, not that a "discriminatee *would have* located suitable interim employment had he only made the required effort." *Id.* at 1319 (emphasis in the original).

It also appears to me that at some point in any fact finding process the burden is subject to being shifted and that that should have been the case here. I am unable to say that a fact finding is clearly erroneous where it involves a man who only got in touch with twenty-four dealers out of some five hundred in the metropolitan area where he lived and then only sporadically, frequently by telephone, and many times where he had been turned down without any invitation to return. In other words, the company had met its burden of proof, and this proof was not overcome by any contrary evidence, at least, insofar as saying that it was clearly erroneous is concerned.

I do not agree with the majority's interpretation of the trial examiner's characterization of many of Sergott's contacts as "window dressing." The trial examiner had an opportunity to hear Sergott's testimony, and I read the characterization as a finding that Sergott was less than credible.

The Board in reversing did not do so on the basis of failure to meet the burden of proof but simply on a sweeping statement, which I find virtually unsupported other than by the Board's own assertion, that Sergott continued

to make a reasonable search The facts speak for themselves. The Board laid emphasis on (1) the fact that there was no evidence that Sergott at any time during the period received or refused any job offers; (2) that there was no showing that any jobs were available at any of the dealers to whom he applied or at any of the other Chicagoland dealers; and (3) that Sergott testified that he had not applied to the other dealers because he only applied to the dealers that gave him hope of getting a job.

Certainly, it appears to me, the lack of evidence that he was not offered a job bears only minimally on whether he used reasonable efforts; and the lack of evidence that he did not refuse one does not bear at all on the reasonableness-of-search question. I find incredible the thought that nearly half a thousand automobile dealers during nearly a year long period would not through normal processes of turnover, death, removals from the territory, promotions, and numerous other factors common to all businesses, have had need for hiring experienced salesmen. I find equally incredible the necessity for showing by a widespread canvass this fact of everyday knowledge. Lastly, the hope that Sergott supposedly had when he made his repeat calls appears to be of gossamer quality and after several turn downs would not even seem to be of that magnitude.

Further, the majority opinion, as well as the Board, appears to rely on the fact that there may have been a lack of available suitable employment. In my opinion, this adds an improper element above and beyond the requirement that there be the good faith reasonable effort. Presumably there could be economic disaster areas where unemployment was so widespread that to attempt to seek a job would be obviously fruitless. I express no opinion as to whether even so there should not be some requirement of effort because that is not the case we have here. With a lack of diligence, " 'the circumstance of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant.' American Bottling Co., 116 NLRB 1303, 1307 (1956)." *Madison Courier, Inc., supra* at 1319. (footnote omitted).

There is a basis for the belief that Nickey Chevrolet had assumed the status of *persona non grata* in the eyes of the Board by its long continuing appearances before the Labor Board and its representatives. That such status had been achieved, if it was, is no reason for reaching a different result than plainly indicated by the facts. I think the Board has done so in this case, whatever the motivating factors may have been, and I therefore in the particular procedural posture of this case would order payment by Nickey Chevrolet in accordance with the trial examiner's findings insofar as the period subsequent to April 30, 1970, is concerned. Otherwise, I concur in the opinion of the majority.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1781

NICKEY CHEVROLET SALES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On May 4, 1965, the court of appeals sustained the Board's finding that Nickey Chevrolet Sales, Inc., had violated Sections 8(a)(3) and (1) of the National Labor Relations Act by discriminatorily discharging two salesmen, and enforced the Board's order (Pet. App. 1a). On November 10, 1965, the court of appeals adjudged the Company in civil contempt for refusing to reinstate these employees (Pet. App. 1a). On September 23, 1966, the Board issued a supplemental decision and order (160 NLRB 1279) directing the Company to pay the two employees backpay in specified amounts. On March 11, 1971, the court of appeals again adjudged the Company in contempt, finding that the Company had unlawfully discharged another salesman, Harold Sergott,

because of his union activities (Pet. App. 16a-23a). The court ordered the Company to offer Sergott reinstatement and to make him whole for salary and other benefits lost as a result of his unlawful discharge (Pet. App. 21a-22a).

On August 6, 1971, the Board's Regional Director issued a backpay specification detailing the amount of money due Sergott for the period from October 5, 1969, the date of his discharge, to March 24, 1971, the date of his reinstatement by the Company (Pet. App. 2a, 7a; A. 49-52).[1] The Company filed an answer thereto (Pet. App. 2a; A. 58-60). When informal attempts to agree upon the amount of backpay due Sergott proved unsuccessful, a backpay hearing was held before a Trial Examiner and decisions were subsequently entered by the Examiner and the Board (Pet. App. 1a-15a; 195 NLRB 395). The Board awarded Sergott a total of $20,606.09 in net backpay, including $17,343.59 for salary lost during the six quarters of the backpay period (Pet. App. 4a-6a; A. 12b-13b).[2]

2. The court of appeals accepted the Company's suggestion that, since the Company's obligation to pay backpay to Sergott arose from the order of the court rather than an order of the Board, "the Board's determination * * * be treated as that of a special master and [be] adopted by [the] court except where clearly erroneous" (Pet. App. 5).[3] In short, the court treated the Board's ap-

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[1]"A." refers to the appendix in the court below.

[2]The Trial Examiner had recommended elimination of backpay from April 30, 1970 to March 24, 1971, on the ground that Sergott had not made a reasonable effort to obtain work during this period (Pet. App. 11a-14a). The Board rejected this recommendation (Pet. App. 4a-5a).

[3]The court's opinion is reported at 493 F. 2d 103.

plication for enforcement of the backpay order as a petition that the court judicially determine the amount of backpay which the Company must pay Sergott to purge itself of contempt under the court's 1971 judgment (Pet. App. 9). The court held that the Board's findings and conclusions were fully supported by the record and adopted them as its own. Respecting the Board's reversal of the Trial Examiner (n. 2, *supra*, the court stated (Pet. App. 6-8):

> The examiner concluded that Sergott's efforts [to find other employment] after April 30, when he was no longer reporting to the employment office, could not be deemed reasonable. The Board reversed this part of the examiner's decision, on the basis that respondent had failed to sustain its burden of establishing that Sergott wilfully incurred a loss of earnings.
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> * * * At the time of discharge, Sergott was 44 years old and had been employed as a salesman by Chevrolet and Cadillac dealers for 18 years. Sergott registered with the state employment agency and reported 29 times up to April 30, 1970. Apparently these did not produce referrals. During the same period he called on 20 car dealers and made some 20 follow up telephone calls. After April 30 and before reinstatement, he made new contacts with four dealers and his total contacts with these dealers and some of those contacted earlier were 72, including a number of phone calls. Sergott testified he directed his later efforts toward those who initially encouraged him. He received no offers except from two dealers who conditioned further consideration on his resignation from the union.

The examiner did not discredit Sergott's testimony, only noting that in his judgment, "many of the contacts made by Sergott were window dressing."

Respondent proved only that there are more than five hundred new and used car dealers in the metropolitan area of Chicago. It offered no testimony as to business conditions during the period or other evidence tending to show that jobs were available for a salesman notwithstanding known union associations, or that the lack of opportunity with the dealers to whom Sergott applied was not representative. Sergott testified that "economically things were a bit slow at this time."

We think that the examiner, in ultimate effect, imposed on Sergott the burden of proving that his efforts were reasonable. Given the efforts Sergott was shown to have made, and in the absence of proof bearing at least generally on the availability of suitable employment in the area, we conclude the respondent did not discharge its burden of proof. Accordingly, we consider the examiner's adverse finding clearly erroneous, and find that Sergott's efforts were reasonable.

3. There is no merit to petitioner's contention that the court below required it to show, not only a lack of due diligence by Sergott in his search for other employment (see *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198), but "seemingly plac[ed] on the employer (almost, if not quite) the burden of proving that due diligence would have geen rewarded" (Pet. 9). The court merely held that, given the efforts Sergott made, the Company, in

showing only that there are more than 500 car dealerships in the Chicago metropolitan area, did not discharge its burden of proving that Sergott "failed to make the requisite 'reasonable efforts to mitigate [his] loss of income * * * .'" *National Labor Relations Board* v. *Madison Courier, Inc.*, 472 F. 2d 1307, 1318 (C.A.D.C.), quoting from *National Labor Relations Board* v. *Arduini Mfg. Corp.*, 394 F. 2d 420, 422 (C.A. 1).

There is also no substance to petitioner's contention that the court "gave too cavalier treatment to that part of Rule 52(a) [of the Federal Rules of Civil Procedure] requiring that due regard be given to the opportunity of the trial court * * * to judge of the credibility of the witnesses" (Pet. 12). As the court of appeals noted, the Trial Examiner "did not discredit Sergott's testimony" as to his numerous attempts to obtain substitute employment (Pet. App. 7), but found that those efforts were not reasonable. The contrary finding of the Board and the court as to the reasonableness of Sergott's efforts did not involve a contrary credibility determination, but merely a different evaluation of the legal effect of the undisputed facts.[4]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JULY 1974.

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[4]The dissenting judge agreed that the "standards for determining whether there is back pay entitlement are correctly outlined in the majority opinion" (Pet. App. 11). However, he evaluated the evidence differently than did the court majority (see Pet. App. 12-13).